Supreme Court, U.S.
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No.

In The

# Supreme Court of the United States

October Term, 1996

MILDRED MARIE WHITE, PATSY ANN McCOY, ROBERT CECIL BRINSON, CLIFTON CONNOR DEWITT, SAMUEL NEWTON, WILLIAM CLEN MATTOCKS, HAROLD MACK McCOY and FRED DAVIS DOBSON,

*Petitioners,*

*vs.*

MICHAEL P. DOWNS and JAMES A. CATHCART,

*Respondents.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit*

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether or not the decision of the Fourth Circuit affirming the granting of summary judgment on the merits to Respondent Downs conflicts with the decision of this Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), given that the Petitioners were not allowed to conduct discovery in District Court.

2. Whether or not the decision of the Court of Appeals in affirming the dismissal against the Respondent Cathcart on the grounds that the complaint failed to state a claim upon which relief can be granted conflicts with the decision of this Court in *Conley v. Gibson*, 355 U.S. 41 (1957).

3. Whether or not the decision of the Fourth Circuit holding that there was not clearly established law forbidding Respondents from violating Petitioners' Fourth Amendment rights is in conflict with this Court's decision in *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).

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Appendix A — Opinion of the United States Court of Appeals for the Fourth Circuit Decided April 30, 1997 ..... 1a

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Petitioners, Mildred Marie White, *et al.*, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

## OPINIONS BELOW

The opinion of the Court of Appeals is unpublished and is reproduced in the appendix filed herein at 1a, the unpublished opinion of the District Court is reproduced at App. B at 17a.

## STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on April 30, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

Federal Rule of Civil Procedure 8(a)(2) provides:

> A pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief.

## STATEMENT OF THE CASE

Petitioners are civilians who were employed as barbers at Marine Corps Base, Camp Lejeune, North Carolina. On August 28, 1991, each of the three barber shops where the Petitioners worked were entered by agents of the Criminal Investigation Division (CID) of the Provost Marshal's Office (PMO) and other visibly armed military policeman who announced in each instance that the barber shop was being "secured," and who purported to close the shops on the authority of the Commanding General. After searching the persons, pocket books, and private work spaces of the Petitioners, CID agents marched Petitioner, Harold McCoy, who was employed at the Building 4 Barber Shop, under armed guard to the CID offices located at the PMO. Petitioners Patsy McCoy and Mildred White, employed at the Camp Johnson Barber Shop, were likewise marched under armed guard to the satellite CID offices at Camp Johnson for interrogation. In the case of French Creek Barber Shop, the Petitioners at work there, Brinson, Newton, and Dewitt, were transported by government vehicle to the PMO headquarters where they were kept under guard, interrogated, fingerprinted and photographed. Mattocks was taken into custody by CID when he reported for work the next day. Dobson, who was on vacation on the day of the initial raid, was ordered to report to CID for questioning when he returned to report for work on September 3, 1991.

The Petitioners were held for several hours against their will while the questioning and other procedures took place. Most were required to sign forms giving the agents access to their bank account records. No evidence was uncovered that any of the Petitioners had done anything wrong. All Petitioners were suspended without pay. Petitioners Mattocks and Harold McCoy were actually terminated and managed to regain their employment only through administrative hearings.

On August 29, 1994 Petitioners sued Respondents in the United States District Court for the Eastern District of North Carolina invoking jurisdiction under 28 U.S.C. § 1331 and directly under the Fourth Amendment. The complaint alleged that Respondent Downs was the Commanding General of Marine Corps Base, Camp Lejeune, that he ordered that the Petitioners be searched and seized without probable cause, and that he was therefore liable for compensatory and punitive damages. The complaint further alleged that Cathcart was the Chief of Staff of Camp Lejeune and that all the actions of Respondent Downs were undertaken with the "advice, counsel, consent and approval" of Cathcart. App. B at 21a.

Respondents filed a "Motion to Dismiss or in the Alternative for Summary Judgment," and simultaneously filed a motion to stay discovery, which was allowed over Petitioners' objection. On the motion for summary judgment they introduced copies of three documents, each entitled "Command Authorization for Search and Seizure" with supporting affidavits. Petitioners were not aware that these documents existed prior to their being filed with the motion. Petitioners responded by filing affidavits executed by six of them, as well as a copy of the "Synopsis of Investigation" prepared by the CID agent in charge of the operation. They also filed other documents obtained in the course of the administrative procedures whereby they were reinstated to employment.

The District Court, after having stayed discovery, granted Respondents' "Motion to Dismiss or in the Alternative for Summary Judgment," holding that Petitioners had failed to state a claim upon which relief could be granted against Cathcart. App. B. at 22a-26a. The court also granted the motion as to Downs on the grounds that only thing that he did was to issue the Command Authorizations, observing "there is no factual support for plaintiffs' suggestion that Commander Downs

conducted, authorized, directed, ordered or condoned searches or seizures of the persons of the plaintiffs." App. B at 22a. The District Court went on the hold that Downs was entitled to "something akin to quasi-judicial immunity" in issuing the Command Authorizations and further that even if he was not entitled to immunity, he was nevertheless not liable because the Command Authorizations were based upon probable cause. App. B at 25a.

In an unpublished opinion, the United States Court of Appeals for the Fourth Circuit affirmed the decision of the District Court. App. A at 2a-16a. The court held that the Petitioners did not introduce any evidence that Downs had authorized the seizure of the barbers or that Cathcart had any role in Downs' decision. App. A at 11a. The court went on to say that Downs was entitled to qualified immunity based on the fact that "it is clear that at the time Downs allegedly authorized the seizure of Plaintiffs, there was no clearly established law forbidding him to do so." App. A at 14a. Furthermore, in response to Petitioners vigorous protestation that there was no probable cause to support any of the actions of the Respondents in this case, the court went on to hold that Respondents were entitled to qualified immunity even if probable cause did *not* exist for the issuance of the Command Authorizations.

## REASONS FOR GRANTING THE WRIT

### I.

### THE DECISION OF THE FOURTH CIRCUIT, AFFIRMING THE DISTRICT COURT'S GRANTING RESPONDENT DOWNS' SUMMARY JUDGMENT ON THE MERITS, CONFLICTS WITH THE DECISION OF THIS COURT IN *ANDERSON v. LIBERTY LOBBY, INC.*, 477 U.S. 242 (1986), SINCE PETITIONERS WERE NOT ALLOWED TO CONDUCT DISCOVERY IN THE DISTRICT COURT.

The procedure employed by both of the lower courts in holding for Downs in this case flies squarely in the face of *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Indeed, the Fourth Circuit explicitly recognized that Petitioners contended that Downs issued verbal orders to take them into custody at footnote 2 of its opinion, but affirmed the District Court's decision on the grounds that Petitioners had not produced any evidence that Downs had done so. App. A at 4a. But the Fourth Circuit failed to take into account that Petitioners were not allowed to conduct any discovery whatsoever. *Anderson v. Liberty Lobby, Inc., supra*, rests on the premise that "in our analysis here, we assume that both parties have had ample opportunity for discovery." 477 at 250 n. 5

Furthermore, the Fourth Circuit inferred that the bare production of the Command Authorizations by Downs somehow supported the conclusion that Downs had done nothing but sign the search authorizations. But Downs did not even file an affidavit to that effect. To decide the case on such flawed logic is arbitrary, unfair, and unjust. There is nothing irreconcilable in the proposition that Downs signed the search authorizations and further gave verbal orders that Petitioners be taken into

custody. Furthermore, such a resolution leaves as the only explanation for what happened, that three teams of United States Marine Corps investigators all simultaneously exceeded the scope of their orders in the exact same manner. Surely such a result must at least strain, if not abuse, the credulity of this Court in light of the "peculiar and special relationship" between a commander and those his under command. *Chappell v. Wallace*, 462 U.S. 296, 299 (1983).

This Court should make it clear that although discovery may be stayed pending a determination of an immunity issue it is not proper to make a decision on the merits against a party, under that circumstance, especially when, as here, that party has access to the evidence he needs to withstand summary judgement only by discovery. *Cf. Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

## II.

## THE DECISION OF THE COURT OF APPEALS IN AFFIRMING THE DISMISSAL AGAINST THE RESPONDENT CATHCART ON THE GROUNDS THAT THE COMPLAINT FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED CONFLICTS WITH THE DECISION OF THIS COURT IN *CONLEY v. GIBSON*, 355 U.S. 41 (1957).

The Court of Appeals affirmed the District Court's dismissal of the claim against Cathcart on the grounds that Petitioners offered no "explanation whatsoever of Cathcart's specific involvement in the seizures." App. A at 10a. The complaint alleges that Cathcart was Chief of Staff and that Downs actions were under taken with Cathcart's "advice, counsel, consent, and approval." App. B at 21a. Furthermore, on the summary judgment motion, Petitioners offered a CID document which showed that Cathcart was "kept apprised" throughout the investigation.

Under general principles of tort law, to advise or counsel a tortfeasor to commit a wrong renders one liable as a joint tortfeasor. Restatement (second) of Torts § 876. A complaint is to be dismissed for failure to state a claim only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41 (1957); *Jenkins v. McKeithen*, 395 U.S. 411 (1969). Petitioners are unaware of any requirement in F.R.C.P. 8 that the complaint "explain" any thing, as the Fourth Circuit would apparently require. Indeed, "the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim." *Conley v. Gibson*, *supra*, 335 U.S. at 47. Any "heightened pleading standard" goes to the identification of the "clearly established right" alleged to be violated, rather than to the detailing of exactly what was said and done and when it was said and done. *Siegert v. Gilley*, 500 U.S. 226 (1991). Such evidence is in the exclusive control of a defendant. It is to require the impossible of a pleader to know the details of what occurred in a closed setting prior to drafting the complaint and conducting discovery.

Petitioners intend to prove that Cathcart was Down's Chief of Staff and in essence, his *alter ego*. Cathcart was Downs' legal advisor, his *de facto* Staff Judge Advocate, who under military law had the duty to see that the legal rights of those subject to Downs's power were not violated. *United States v. Lopez*, 35 M.J. 35 (C.M.A. 1992); *United States v. Washington*. 39 M.J. 1014 (A.C.M.R. 1994). Petitioners further intend to prove that it was Cathcart who formulated the ill-conceived scheme of issuing the search authorizations, which were not necessary for Downs to obtain any of the property in the barber shops for which there was probable cause to believe existed and to which he was legitimately entitled.[1] The Command Authorizations were

1. The Command Authorizations authorized the seizure of the following (Cont'd)

no more than a pretext to have the Petitioners arrested and interrogated on the hope that they would confess to stealing money. The entire charade was played out despite the fact that not a shred of evidence existed that any of Petitioners had committed any wrong whatsoever. In fact, they all had unblemished personal and work records.

If Petitioners failed to allege enough in their complaint to state a claim against Cathcart, this Court should decide what words need to be said to comply with F.R.C.P. 8. On the other hand, if Petitioners' claim against Cathcart was wrongly dismissed with prejudice, this Court should correct the error.

## III.

## THE DECISION OF THE FOURTH CIRCUIT HOLDING THAT THERE WAS NOT CLEARLY ESTABLISHED LAW FORBIDDING RESPONDENTS FROM VIOLATING PETITIONERS FOURTH AMENDMENT RIGHT IS IN CONFLICT WITH THIS COURT'S DECISION IN *BIVENS v. SIX UNKNOWN FEDERAL NARCOTICS AGENTS*, 403 U.S. 388 (1971).

The Fourth Circuit concluded that "at the time Downs allegedly authorized the seizure of Plaintiffs, there was no clearly

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(Cont'd)
items: "cash register tapes, receipts, bookkeeping paraphernalia, U.S. currency and record keeping documentation . . ." App. B at 19a. The cash register tapes and currency in the registers were turned in each evening at the close of business by the head barber, the only barber in each shop to handle money. Downs or his designee could have had the tapes or the money at any time simply by walking in and taking it. No evidence was ever presented that any receipts, "bookkeeping paraphernalia," or record keeping documentation ever existed. All of the personal money, "U.S. currency", that the petitioners detained on August 28, 1991 had was taken away from them by the CID agents, leaving a least three of them without the means to buy gasoline to get home after they were finally released.

established law forbidding him to do so." App. A at 14a. The Court of Appeals held this in spite of its overt recognition of the premise that "The Fourth Amendment right to be searched and seized only upon a showing of probable cause, absent a recognized exception, is clearly established." App. A at 12a. How the court arrived at its conclusion, based upon its premise, is at least unclear and could be properly characterized as sophistical.

This Court has traditionally taken a "hands-off" approach to situations involving rights of military men violated by their superiors, *e.g. Chappell v. Wallace*, *supra*, and given commanders the power to summarily exclude civilians from their base. *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961); *United States v. Albertini*, 472 U.S. 675 (1985). But this Court has never said anything to in any way imply that the right of a civilian to be free of an unreasonable search and seizure at the hands of the military was in any way "not clearly established." That the Fourth Circuit so held is evidence that there is enough doubt on the issue to occasion grievous concern. It is ironic that one of the pillars of the American system, the respect traditionally accorded the constitutional rights of civilians by the military, and conversely demanded of the military by the citizenry, should come into question over two hundred years after the ratification of the Constitution.

Since the Fourth Circuit's opinion is unpublished, the right of civilians to be free of unreasonable search and seizure at the hands of the military is no more "clearly established" now than it was before the decision was rendered. This Court should not suffer the law in this area remain in such a sorry state.

This case also offers this Court to an opportunity to clarify the commitment that Federal Courts should have in assuring that innocent victims of governmental abuses of constitutional rights are afforded remedies. The action which gave rise to this

lawsuit is the epitome of unreasonable search and seizure. There was no evidence of any wrong doing whatsoever on the part of any of the Petitioners. The so-called "probable cause" was laughable.[2] The issuance of "Command Authorizations" was unnecessary for any legitimate purpose. The taking of the Petitioners into custody for the purpose of interrogation on the off-chance that one of them might admit to something was an action more befitting a Gestapo unit than any arm of the United States of America, a "round-up" more egregious than that condemned by this Court in *Davis v. Mississippi*, 394 U.S. 721 (1969).

The military courts recognize full well that a "Search

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2. As the Fourth Circuit noted, the probable cause was primarily based upon CID agents counting the number of persons exiting the barber shops with "fresh haircuts" and then comparing that number to the number of haircuts that were reported by the shops. But the "count" had several fatal flaws. To begin with, one of the agents testified at petitioner Mattocks' reinstatement hearing that he was told at the agents' briefing to count everyone who exited the barber shop regardless of the perceived status of the person's hair. Secondly, under a general order, a marine in uniform must wear a cover (hat) at all times out of doors. Thirdly, even petitioners, who have cut marines' hair for up to thirty years, are unable to tell how recently a marine has had a haircut, even as he sits in the barber's chair. To give credence to the judgment of any person who purports to be able to determine the "freshness" of a marine's haircut from any distance, much less a distance several hundred feet, is ludicrous. To find probable cause based on such data is contrary to common sense.

Furthermore the reliance on an incident where a CID agent allegedly saw a head barber in one of the shops pocket money on one occasion gives no reason to believe that any of petitioners had done anything wrong. App. at 18a. Moreover, even if there was a discrepancy between the cash register tapes and the amount of money in drawers during spot checks in some of the many barber shops at Camp Lejeune, only the head barber in each shop handles money and operates the cash register. Mattocks is the only petitioner who was a head barber. He knows of no discrepancy ever discovered in his shop during a spot check.

Authorization" is not a "warrant" within the meaning of the Fourth Amendment, and regard the equating of a military commander to a "neutral and detached" magistrate as a "contradiction of common sense." *United States v. Stuckey*, 10 M.J. 347 (C.M.A. 1981). Yet, as this case tragically illustrates, a United States District Court and a Federal Court of Appeals are willing to insulate from liability those who abused their positions of power and trust with inapposite citations of authority and specious logic. This Court must step into the breech. *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971) clearly established the right to be free of violations of Fourth Amendment rights on the part of all who act under federal authority.

If the rights of military personnel had been abused in the manner that the rights of Petitioners were abused, the military people would have a remedy available to them. *Chappell v. Wallace, supra.* As this case now stands, Petitioners have no remedy against Respondents whatsoever. Given that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury," *Marbury v. Madison*, 1 Cranch 137, 163 (1803), quoted in *Bivens, supra*, 403 U.S. at 397, the Court should correct this unjust situation.

## CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED APRIL 30, 1997**

**UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

No. 95-2177

MILDRED MARIE WHITE; PATSY ANN MCCOY; ROBERT CECIL BRINSON; CLIFTON CONNER DEWITT; SAMUEL NEWTON; WILLIAM CLEN MATTOCKS; HAROLD MACK MCCOY; FRED DAVIS DOBSON,

*Plaintiffs-Appellants,*

v.

MICHAEL P. DOWNS; JAZMES A. CATHCART,

*Defendant-Appellees.*

Appeal from the United States District Court
for the Eastern District of North Carolina, at Greenville.
James C. Fox, Chief District Judge.
(CA-94-122-4-CV-F1)

Argued: January 27, 1997

Decided: April 30, 1997

Before RUSSELL and WILKINS, Circuit Judges, and
OSTEEN, United States District Judge for the
Middle District of North Carolina, sitting by designation.

Affirmed by unpublished per curiam opinion.

*Appendix A*

## COUNSEL

**ARGUED:** Jeffrey Stephen Miller, Jacksonville, North Carolina, for Appellants. Stephen Aubrey West, Assistant United States Attorney, Raleigh, North Carolina, for Appellees. **ON BRIEF:** Janice McKenzie Cole, United States Attorney, Barbara D. Kocher, Assistant United States Attorney, Raleigh, North Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

## OPINION

PER CURIAM:

This case involves a set of claims brought by eight civilians against two military officers affiliated with the Marine Corps Base at Camp LeJeune, North Carolina, alleging violations of their constitutional rights. Plaintiffs allege in their *Bivens* action that Michael P. Downs, the Commanding General of Camp LeJeune, and James A. Cathcart, Downs' Chief of Staff and second-in-command of Camp LeJeune, violated their Fourth Amendment rights by authorizing an unconstitutional search and seizure. The district court stayed discovery pending a ruling on the dispositive motion and subsequently granted Defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) or, in the alternative, for summary judgment pursuant to Fed. R. Civ. P. 56. For the reasons that follow, we affirm the decision of the district court.

*Appendix A*

I.

At the time the alleged unconstitutional acts occurred, Plaintiffs were civilians making their livings cutting hair at three barber shops located on the base at Camp LeJeune. While waiting to get his haircut on July 19, 1991, Chief Warrant Officer J. McCaslin, Officer in Charge of the Criminal Investigation Division ("CID") of the military base, observed two marines paying the head barber for their haircuts at the cash register. Each haircut costs three dollars.[1] The head barber duly received three dollars from each marine but only recorded one sale in the cash register. McCaslin then observed the head barber pocketing the remaining three dollars.

In the wake of McCaslin's observance, CID contacted the Review and Analysis Branch of the Department of Morale, Welfare, and Recreation ("MWR"), whereupon it was discovered by the CID that MWR had conducted unannounced "spot checks" of the various barber shops on the base. These random checks had revealed that "the registers always contain[ed] more money than on the register receipt; however, when the daily activity reports [were] turned in the number on the register tapes and the amount of money turned in balance[d]." (McKee Aff., J.A. at 48.) This led CID to conduct a "constant visual surveillance" of three barber shops on the base. Over a period of four days, August 5, 12, 15, and 19, 1991, surveillance teams with at least two "accredited criminal investigators" made head counts of those persons entering and exiting the barber shops. The investigators compared the number of those exiting with

1. Head barbers receive a fifty-eight percent commission on haircuts and a seventy-three percent commission on all other services. Line barbers receive approximately five percent less in commissions than the head barbers. The remainder goes to the federal government.

"fresh haircuts" to the number of customers reported by the barbers on their daily reports and the number of sales recorded on the daily cash register receipts. The results of the investigation indicated that there was a "substantial loss of government funds." *Id.*

Armed with this data, Staff Sergeant B. McKee, a criminal investigator with CID, presented sworn testimony to General Downs on August 28, 1991, for the purpose of obtaining authorization to conduct searches of three barber shops. McKee's three affidavits summarized McCaslin's eyewitness observation, MWR's spot check findings, and CID's visual surveillance. Each affidavit concluded with the following statement from McKee: "It is believed that this activity is an ongoing course of business for this barber shop and that stolen U.S. currency, and personal as well as U.S. government record keeping documentation is maintained within the barber shop. . . ." (J.A. at 49, 53, 57.) The Command Authorizations for Search and Seizure issued by Downs each limited the search to the three barber shops and authorized the seizure of the following items: cash register tapes, receipts, bookkeeping paraphernalia, U.S. currency, and record keeping documentation concerning the operation of the barber shops. The Command Authorizations did not, however, direct the seizure of any specific person.[2]

On the same day as the Command Authorizations were issued, CID agents were accompanied by uniformed military police to the three barber shops in order to execute the searches.

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2. Plaintiffs contend that Downs gave further verbal orders contemporaneous with the issuance of the written Command Authorizations to the effect that "all barbers present in the shops be taken into custody, transported to the Provost Marshal's Office (PMO) and interrogated. . . ." (Br. of Appellants at 13.)

*Appendix A*

Plaintiffs allege that after the searches were executed each of them was seized, separated from the others, and kept under guard in isolation for varying periods of time while being interrogated. Plaintiffs were allegedly suspended without pay pending the investigation. No criminal charges were ever filed against any Plaintiff. Each Plaintiff was eventually reinstated.

Plaintiffs seek compensatory and punitive damages against Downs and Cathcart. The complaint states the following claims relevant to this appeal:

> 8. That at all times material hereto, including specifically the months of August and September of 1991, the defendant, JAMES A. CATHCART, was the Chief of Staff of Marine Corps Base, Camp Lejeune, North Carolina. That all of the actions of the defendant, MICHAEL P. DOWNS, complained of below, were undertaken with the advice, counsel, consent, and approval of the defendant, JAMES A. CATHCART, who acted in such a way to make him jointly liable with the defendant, MICHAEL P. DOWNS, for the plaintiffs' injuries.
>
> . . . .
>
> 10. That on or about August 28, 1991, the defendant, MICHAEL P. DOWNS, authorized persons under his command, specifically members of the Criminal Investigation Division (CID) of the Provost Marshal's office and other military

> policemen, to search the workplaces of the plaintiffs, to seize the persons of the plaintiffs, and to take them into custody and to search the persons and effects of the plaintiffs.

(Compl. ¶¶ 8, 10, J.A. at 7.)

The district court granted Defendants' motion to dismiss or, in the alternative, for summary judgment. As to Cathcart, the lower court reasoned that Plaintiffs failed to state what action or actions by Cathcart they attributed to Downs or what principles of law support their "novel theory of *respondeat superior*." (J.A. at 167.) As to Downs, the lower court concluded that no factual support existed to suggest that Downs authorized any actions other than those specified on the face of the Command Authorizations. Furthermore, the district court found that Downs was entitled to "something akin to quasi-judicial immunity" in fulfilling the duties of his office. (J.A. at 170.) Finally, even assuming that Downs did not possess any form of immunity, the district court concluded that the Command Authorizations were supported by probable cause as set forth in McKee's affidavits.

Plaintiffs appeal from the district court's order of May 4, 1995.

II.

The first issue on appeal is whether the district court erred in granting Defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) or, alternatively, Defendants' motion for summary judgment pursuant to Fed. R. Civ. P. 56. We view the

district court's ruling as converting Defendants' motion to dismiss into a motion for summary judgment as the district court considered affidavits and other materials submitted by the parties in reaching its decision.[3] Before considering whether the district court properly granted Defendants' motion, the parameters of qualified immunity should be noted as it governs the resolution of this case.[4]

Government officials performing discretionary functions are generally protected from civil damages liability as long as their "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Taylor v. Waters*, 81 F.3d 429, 433 (4th Cir. 1996). The policy reasons supporting such a rule are compelling: the substantial costs of permitting damages actions against government officials with the same force as against nongovernment individuals include the expense of litigation, the diversion of official energy from

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3. *See* Fed. R. Civ. P. 12(b) ("If, on a motion asserting the defense numbered (6) to dismiss . . . matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. . . .").

4. Indeed, when qualified immunity is asserted as a defense, the court reviewing such a defense "should assess, before anything else, whether the alleged conduct violated law clearly established at the time the conduct occurred." *DiMeglio v. Haines*, 45 F.3d 790, 798 (4th Cir. 1995). The court in *DiMeglio* went on to find that requiring a court to conduct a full review of such a claim on the merits would undermine the policy of qualified immunity. Specifically, "[s]uch a requirement would undermine one of the express purposes of immunity, which is, 'to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit.' " *Id.* (quoting *Siegert v. Gilley*, 500 U.S. 226, 232 (1991)).

pressing public issues, the deterrence of able citizens from acceptance of public office, and the interference with the discharge of government business, to name a few. *See generally Harlow*, 457 U.S. at 814.

Thus, to effectuate these policies, this circuit has adopted a "heightened pleading standard" consistent with the Supreme Court's urging in *Harlow* that the issue of qualified immunity be resolved by the trial judge at the earliest possible stage of the litigation. *Dunbar Corp. v. Lindsey*, 905 F.2d 754, 763 (4th Cir. 1990); *see also Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (noting that qualified immunity is "an immunity from suit rather than a mere defense to liability" and "such pretrial matters as discovery are to be avoided if possible"). This standard requires a specification of the clearly established rights involved and relates to the degree of factual specificity required in the complaint. *Dunbar*, 905 F.2d at 763 (citations omitted).

The heightened pleading standard finds its justification in the need to prevent " 'fishing expedition[s] in government waters' . . . on the basis of wholly unsubstantiated charges," *Dunbar Corp.*, 905 F.2d at 764 (internal citations omitted). In *Harlow*, the Court stated that once a defendant affirmatively pleads the defense of qualified immunity, a judge may determine

> not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously

> identified as unlawful. *Until this threshold immunity question is resolved, discovery should not be allowed.*

*Id.* at 818 (emphasis added).

Although the district court did not address the issue of a heightened pleading standard in this case, we agree with the district court that the complaint and supporting materials fail to state a cognizable legal claim or, in the alternative, that there is no genuine issue as to any material fact, and Defendants are entitled to summary judgment as a matter of law.

Plaintiffs have premised their *Bivens* claim[5] on the assumption that because Downs and Cathcart were in charge of Camp LeJeune, they must have ordered the allegedly unconstitutional seizures. We are not compelled to address the merits of Plaintiffs' claim, but the point is too obvious and brief to gloss over before reaching the issue of qualified immunity.

Plaintiffs chose to sue the first- and second-in-command of a military base for claimed unconstitutional actions taken by a collection of individuals acting under their supervisors' command. To be sure, Plaintiffs did not name those members of the military police or CID who executed the Command Authorizations as defendants in this suit. The proposition of imposing such liability on persons who did not engage in specific injury-inflicting conduct runs squarely into well-settled principles of law.

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5. *See Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971) (holding that a violation of the Fourth Amendment by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct).

As the district court correctly noted, supervisory liability in civil rights cases is narrowly defined. Although there is no *respondeat superior* liability in *Bivens* actions, *see Estate of Rosenberg v. Crandell*, 56 F.3d 35, 37 (8th Cir. 1995); *cf. Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 735 (1989) (holding that a municipality cannot be held liable in *Bivens*-type actions under a theory of *respondeat superior*), a supervisor could be held liable for the acts of a subordinate "only by proof of [his] direct culpability in causing the injury either by directly authorizing it or by expressly or tacitly condoning by inaction a known pattern of comparable coworker conduct." *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1197 (4th Cir.) (citation omitted), *cert. denied*, 117 S. Ct. 72 (1996). Plaintiffs face a heavy burden of proof in supervisory liability cases. *Slakan v. Porter*, 737 F.2d 368, 373 (4th Cir. 1984).

Plaintiffs fail to meet this heavy burden of proof on two fronts. First, Plaintiffs fail to demonstrate any evidence of an unreasonable risk of harm from a specified source or that Defendants' "corrective inaction amounts to deliberate indifference or 'tacit authorization of the offensive practices.' " *Slakan*, 737 F.2d at 372 (citation omitted). Other than the conclusory allegations in the complaint as referenced above, Plaintiffs have come forward with no evidence that either Downs or Cathcart directly authorized the seizures of the barbers or were deliberately indifferent to a known pattern of such unconstitutional conduct. Second, with respect to the heightened pleading standard in this case, Plaintiffs merely allege that the actions of Downs are attributable to Cathcart without offering any explanation whatsoever of Cathcart's specific involvement in the seizures. As to Downs, Plaintiffs allege that he directly authorized the seizure of the barbers. Downs responded with evidence in the form of the Command Authorizations

demonstrating that he had not, in fact, authorized such seizures. The burden then fell to Plaintiffs to submit evidence in the form of affidavits or otherwise which "set[s] forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968)). Plaintiffs have failed to meet this burden by not presenting any evidence that Downs authorized the seizure of the barbers or that Cathcart had any role in Downs' decision.

Accordingly, we conclude that the district court properly granted Defendants' motion to dismiss or, alternatively, for summary judgment.

III.

We turn now to the issue of the qualified immunity defense raised by Defendants.[6] Assuming that an individual is a government official performing discretionary functions, the crux of the qualified immunity analysis is the "objective legal reasonableness" of the official's alleged unconstitutional act viewed in the context of legal rules that were clearly established at the time the action was taken. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 819-20 (1982)); *Pritchett v. Alford*, 973 F.2d 307 (4th Cir. 1992). In order to determine whether an officer's conduct is immunized, we employ a three-step analysis: 1) identify the specific constitutional right allegedly violated; 2) determine

6. In consideration of the Supreme Court's admonition that it is "quite sparing in its recognition of claims to absolute official immunity[,]" we analyze this case on qualified immunity grounds to "avoid unnecessarily extending the scope" of absolute immunity. *Forrester v. White*, 484 U.S. 219, 224, 108 S. Ct. 538, 542, 98 L. Ed. 2d 555 (1988) (citations omitted).

whether at the time of the alleged violation the right was clearly established; and 3) if the right were clearly established, determine whether a reasonable person in the officer's position would have known that doing what he did would violate that right. *Pritchett*, 973 F.2d at 312. The officer is entitled to immunity if the right were not clearly established at the relevant time or if a reasonable officer would not have known that his conduct violated the right.

Plaintiffs' constitutional claim is that Downs and Cathcart violated their Fourth Amendment rights by authorizing military personnel to search and seize Plaintiffs when they had no probable cause. A determination of whether the legal rule was clearly established at the relevant time turns on the level of abstraction at which the legal rule is assessed. The Fourth Amendment right to be searched and seized only upon a showing of probable cause, absent a recognized exception, is clearly established. It is, however, improper to analyze the applicable right at this level of generality and "would bear no relationship to the 'objective legal reasonableness' that is the touchstone of *Harlow*." *Anderson*, 483 U.S. at 639; *see also Taylor*, 81 F.3d at 434. The inquiry must be more focused in order to make it possible for officials "reasonably [to] anticipate when their conduct may give rise to liability for damages. . . ." *Davis v. Scherer*, 468 U.S. 183, 195 (1984).

> [O]ur cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing

> violates that right. That is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

*Anderson*, 483 U.S. at 640 (citation omitted).

The reasonableness of Downs' and Cathcart's actions is not contingent upon whether probable cause actually existed. *Hunter v. Bryant*, 502 U.S. 224, 226-27 (1991). The doctrine of qualified immunity contemplates that law enforcement officials will make the occasional mistake in judgment. *Malley v. Briggs*, 475 U.S. 335, 343 (1986). A reasonable but mistaken conclusion that probable cause exists, for example, is tolerable because "officials should not err always on the side of caution" for fear of being sued. *Davis*, 468 U.S. at 196. On the other hand, qualified immunity does not protect against "plainly incompetent" judgments or judgments in "know[ing] violat[ion] of the law." *Malley*, 475 U.S. at 341. In determining whether Downs is entitled to qualified immunity, our analysis "must be filtered through the lens of the officer's perceptions at the time of the incident in question." *Rowland v. Perry*, 41 F.3d 167, 173 (4th Cir. 1994) (citation omitted). Thus, Downs and Cathcart will not be denied qualified immunity for making a mistake, so long as that mistake is reasonable given the circumstances.

What sets this case apart from the standard qualified immunity scenario is the presence of the military. The general rule governing the search and seizure of civilians located on a military base and subject to the authority of the base commander is that as long as their actions are based on probable cause,

"military personnel are authorized by statute to arrest and detain civilians for on-base violations of civil law[.]" *United States v. Banks*, 539 F.2d 14, 16 (9th Cir. 1976). As one court in this circuit has held:

> [A]s long as the military respects the rights guaranteed by the Fourth Amendment's prohibition against unreasonable searches and seizures, the military need not be bound by all of the procedural formalities that are imposed upon civilian law enforcement agencies.

*United States v. Rogers*, 388 F.Supp. 298, 301 (E.D. Va. 1975); *see also United States v. Stuckey*, 10 M.J. 347, 361 (1981) ("The commander's power to authorize searches of places and persons under his control exists to whatever extent it does exist because it complies with the Fourth Amendment's basic norm of reasonableness"); *cf. Applewhite v. United States Air Force*, 995 F.2d 997, 1000-01 (10th Cir. 1993) (holding that military personnel engaged in a sting operation did not violate clearly established Fourth Amendment rights in seizing a civilian based upon probable cause to believe she was participating in a narcotics transaction and holding her pending a determination whether civilian authorities would take over the investigation). Thus, it is clear that at the time Downs allegedly authorized the seizure of Plaintiffs, there was no clearly established law forbidding him to do so.

IV.

The evidence that McKee presented to Downs clearly established enough probable cause to support the issuance of

the Command Authorizations. A Command Authorization, the military equivalent of a search warrant, must be supported by probable cause to satisfy the Fourth Amendment. *United States v. Harris*, 403 U.S. 573, 577 (1971).[7] McKee's affidavits summarized over a month-long investigation of the barber shops in question. This investigation by the CID was set in motion by the eyewitness account of Officer McCaslin of a head barber pocketing half of the six dollars he received from two marines for two haircuts. CID then discovered that past spot checks of the base barber shops consistently revealed more money in the cash registers than on the cash register receipts. At the end of the day, however, the money in the cash registers and the cash receipts balanced. The CID then undertook constant visual surveillance wherein teams of military investigators conducted on-the-spot undercover observations of the barber shops over a period of four days.

Plaintiffs vigorously argue that the methods of collecting evidence during the visual surveillances were conclusory, therefore, Defendants' reliance on this evidence was unreasonable. In Plaintiffs' view, because the military investigators could not possibly distinguish between those marines exiting the barber shops under surveillance with fresh haircuts from any other marine exiting with short hair, it was unreasonable for Downs and Cathcart to rely on McKee's affidavits.

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7. Furthermore, search warrants may be issued only by a neutral and detached magistrate. *See, e.g., United States v. Clutchette*, 24 F.3d 577, 579 (4th Cir. 1994). As noted, this case presents a unique twist in that a military commander issued the search warrant. Military officials, like federal magistrates in the civilian realm, are empowered to issue search warrants consistent with the dictates of the Fourth Amendment and "must be neutral and detached and must perform [their] duties with a judicial rather than a police attitude." *United States v. Ezell*, 6 M.J. 307, 315 (1979) (internal quotations and citation omitted).

Qualified immunity is lost only if "the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable." *Malley*, 475 U.S. at 344-45. Notwithstanding the pure speculation by Plaintiffs as to any effects of the allegedly flawed investigative methodologies, under the 'totality-of-the-circumstances" approach to reviewing probable cause determinations, *see Illinois v. Gates*, 462 U.S. 213, 230 (1983), we hold that McCaslin's eyewitness account coupled with the MWR spot check evidence constituted ample probable cause for Downs and Cathcart reasonably to authorize the Command Authorizations.

Accordingly, reasonable officers in Downs' and Cathcart's positions could find probable cause to believe that a crime had been committed against the government.

V.

For the foregoing reasons, we affirm the decision of the district court in granting Defendants' motion to dismiss or, in the alternative, for summary judgment.

*AFFIRMED*

## APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, EASTERN DIVISION FILED MAY 4, 1995

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION

No. 4:94-CV-122-F1

MILDRED MARIE WHITE, PATSY ANN McCOY, ROBERT CECIL BRINSON, CLIFTON CONNOR DEWITT, SAMUEL NEWTON, WILLIAM CLEN MATTOCKS, HAROLD MACK McCOY, and FRED DAVIS DOBSON,

Plaintiffs,

v.

MICHAEL P. DOWNS and JAMES A. CATHCART,

Defendants.

ORDER

This matter is before the court for ruling on the defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment. The plaintiffs have responded in opposition thereto, and defendants have filed a reply. The matter is ripe for disposition.

FACTUAL BACKGROUND

On August 28, 1991, each of the plaintiffs was employed as a civilian barber at one of the three barber shops located aboard the Marine Corps Base, Camp Lejeune, North Carolina.

At about 1:30 p.m. on that date, CID agents, accompanied by uniformed military police personnel conducted synchronized "raids" on the three barber shops. They were acting upon the authority of documents entitled, "Command Authorization for Search and Seizure," which had been issued by Commanding General Michael P. Downs, upon application and affidavit of B.A. McKee, Criminal Investigator.

In a nutshell, McKee's affidavit summarized a month-long investigation of the barber shops, which had been triggered by the alleged observation by CID Officer in Charge, J. McCaslin, of the head barber pocketing half of the $6.00 he received from two Marines for haircuts. CID then learned that spot-checks of the barber shops consistently had revealed more money in the cash registers than on the register receipts, but that the drawers and receipts balanced when the daily activity reports were submitted.

Thereafter, "a constant visual surveillance" of the three barber shops was conducted by "a team of two accredited criminal investigators" on three or four separate days. The investigators made a "count" of persons entering and exiting the barber shops,[1] then compared that figure with the barbers' reports. An example of the investigators' findings on one working day at one barber shop is:

On 12AUG91,497 persons were observed

1. Deposition testimony reveals that some members of the surveillance team were instructed to count only "fresh haircuts," whereas others were instructed simply to "count people that entered and exited . . . I counted them all," Plaintiffs' Exhibit C. One team member testified that he could determine whether a marine had just received a haircut even if that Marine was wearing his "cover" (hat).

> exiting the building with fresh haircuts. Review of the daily activity reports prepared by W.C. Mattocks reflect 389 haircuts were completed. This is a difference of 108 haircuts figured at $3.00 each, reflects a loss of $324.00 in Government funds for that day.

McKee Affidavit, Government Exhibit A, regarding Barber Shop in Building FC-425. Each of the Affidavits concluded with McKee's statement:

> It is believed that this activity is an ongoing course of business for this barber shop and that stolen U.S. currency, and personal as well as U.S. government record keeping documentation is maintained within the barber shop. . . .

*Id.* Each Command Authorization for Search and Seizure which Commander Downs issued contained a finding that probable cause existed to believe the following property was being concealed at each of the three barber shops as described:

> Cash register tapes, receipts, book keeping paraphernalia, United States Currency, and any record keeping documentation concerning the operation of the [particular barber shops in question].

Government's Exhibit A. The Authorization each directed the CID "TO SEARCH the person and/or place named for the property specified and if the property is found there to seize it, leaving a copy of this authorization and receipt for the property

taken. You will provide a signed receipt to this command, containing a full description of every item seized." None of the Authorizations named persons to be searched or seized; only the premises three barber shops were listed.

Plaintiffs have supplied their own affidavits in which they have recounted their shock, embarrassment and fear when the armed law enforcement teams entered the barber shops, rounded up all the employees, searched their persons and their personal effects, as well as the premises of the barber shops. It appears that the law enforcement personnel seized, not only the contents of the barbershops, but also all the cash on the persons of the plaintiffs. Several plaintiffs relate their being marched out of the barber shops, taken to the PMO and subjected to hours and hours of interrogation, accusations and humiliation, and finally, termination from employment. They seek compensatory and punitive damages from Commanding General Michael P. Downs, and his Chief of Staff, James A. Cathcart on the following basis:

> 22. That the actions of the defendant [sic] in this case were oppressive and abusive of their respective positions, done intentionally and with willful and reckless disregard of the rights of the plaintiffs, specifically their rights to be secure in their persons and effects against unreasonable search and seizure, as well as other rights which will be shown more fully at trial of this action.

Complaint at ¶ 22. That is, plaintiffs have sued these defendants for alleged violation of their civil rights pursuant to *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) ("victims of a constitutional violation by a federal agent [acting in his or her

official capacity] have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right") *Carlson v. Green*, 446 U.S. 14, 18 (1980).

## ANALYSIS

As to both defendants, this action must be dismissed insofar as it purports to sue them in their official capacities. Claims against officers in their official capacities are claims against the entity for which the officers were acting — here, the United States of America. *Kentucky v. Graham*, 473 U.S. 159, 165 (1985). The United States has not waived its sovereign immunity for such alleged violations. *See Radin v. United States*, 699 F. 2d 681, 684-85 (4th Cir. 1983) (*Bivens* is a recognized action against federal officers sued in their individual capacities, but not against the Untied States). Therefore, as to both defendants in their official capacities, this action is DISMISSED.

### *A. Chief of Staff Cathcart*

The only mention of defendant Cathcart in plaintiff's complaint, other than alleging jurisdictional particulars related to his residency, is (i) that he was the Chief of Staff of Marine Corps Case, Camp Lejeune, North Carolina; and (ii) that all of Commander Downs' actions were "undertaken with the advice, counsel, consent, and approval of the defendant, JAMES A. CATHCART, who acted in such a way to make him jointly liable with" Downs. Complaint at ¶ 8. In their memorandum filed in opposition to the instant motion, plaintiffs contend that Cathcart is Downs' "alter ego" and that "Cathcart's action [sic] were attributable to Downs under well-known principles of military and civilian law." Plaintiffs' Memorandum at 10.

Plaintiffs, however, failed to mention what action(s) of Cathcart they attribute to Downs, or what well-known principles of law support their theory. The complaint contains no factual allegations regarding any conduct by Cathcart, nor have plaintiffs explained what appears to be a novel theory of *respondeat superior* which would render the Commander of a Marine Corps Base subject to the "advice, consent, counsel and approval" of his Chief of Staff.

It is well-settled that there is no *respondeat superior* liability in *Bivens* actions. *Jett v. Dallas Independent School District*, 491 U.S. 701, 735 (1989); *Terrell v. Brewer*, 935 F.2d 1015, 1018 (4th Cir. 1991); *Giancola v. West Virginia Dept. of Public Safety*, 830 F.2d 547, 550 (4th Cir. 1987). In short, plaintiffs have failed to state a claim, cognizable under *Bivens* against defendant Cathcart, upon which relief may be granted. This action as against Cathcart is, therefore, DISMISSED.

*B. Commander Downs*

The only conduct of Commander Downs mentioned in the Complaint is his issuance of the Command Authorizations. Plaintiffs mistakenly allege that the Authorizations permit CID officers to "seize the persons of the plaintiffs, and to take them into custody and to search the persons and effects of the plaintiffs." Complaint at ¶ 10. As noted above, the Authorizations direct the search only of the premises of the barber shops and the seizure of those items listed. There is no factual support for plaintiffs' suggestion that Commander Downs conducted, authorized, directed, ordered or condoned searches or seizures of the persons of plaintiffs.

Plaintiffs' theory of supervisory liability based on the old

maritime law discussed in *The Eleanor*, 15 U.S. 345 (1817), is clever but misplaced. Many of the conditions which dictated principles announced in *The Eleanor* no longer exist in this era of instantaneous communications. Nevertheless, *The Eleanor* does not stand for the proposition for which plaintiffs cite it.

*The Eleanor* address the liability of a ship's captain and a squadron commander under the law of maritime trespass which, apparently, makes a distinction between capturing another ship as a prize (whereby a prizemaster, appointed by the commander, becomes the agent of the whole squadron and for whose actions the commander is responsible) and halting another ship for the purpose of detaining it for search (the "right of search and visitation"). The Court, after noting that the facts presented a case of "extreme hardship"[2] determined that "this was a mere case of detention for search," and that the lower courts had erred in issuing a decree holding Commodore Rodgers "answerable, as commander of the squadron . . . for forty-three thousand two hundred and fifty dollars, the value of said vessel and cargo." *Id.* at 348.

Plaintiffs' heroic efforts to ascribe principles of maritime

2. Two vessels were sailing together when they came upon a third and caused it to heave-to. The crew members of the overtaken ship believed they had been captured by British cruisers, the enemy, and therefore refused to have any part in navigating their ship or cooperating with their "captors" in any way. Although a lieutenant from one of the vessels tried valiantly to convince the crew of the overtaken ship that they were not prisoners and should return to their duties, "they persisted in refusing; in consequence of which (the sea being tempestuous, and the weather squally) a flaw struck the vessel and both her masts went over." *The Eleanor*, 15 U.S. at 347-48. The ship ultimately was lost, and this action for libel was filed against the commanders of both overtaking vessels, in which it was alleged that the commanders were liable for restitution.

and military accountability to a Marine Corps base commander acting in a quasi-judicial capacity are unavailing. This is a *Bivens* action and must be governed by the law which applies to such cases. Among the more fundamental premises of civil rights jurisprudence is the unavailability of *respondeat superior* liability; a plaintiff must demonstrate personal conduct by each defendant which amounts to a violations of the plaintiff's civil rights.

Supervisory liability in the civil rights context is narrowly defined. A plaintiff must allege and demonstrate "that the supervisor's corrective inaction amounts to deliberate indifference or 'tacit authorization of the offensive practices.' " *Slaken v. Porter*, 737 F. 2d 368, 372 (4th Cir. 1984), *cert. denied*, 470 U.S. 1035 (1985). Here, plaintiffs have failed in any way to support their suggestion that Downs was deliberately indifferent or that he tacitly authorized their detention, search and interrogation.

Rather, all the evidence of record is consistent that Downs relied on McKee's affidavits in finding probable cause to issue Command Authorizations for the search of the three barber shops and seizure of the property specified in the Authorizations. *See* Rule 315, Military Rules of Evidence.[3] That military law enforcement officers may or may not have exceeded their authority as set forth in the Command Authorizations simply is not attributable to Commander Downs so as to render him vicariously liable in damages to the plaintiffs.

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3. *See also* Plaintiffs' Exhibit D — an excerpt from R.C.M ("Rules of Court Martial"), which contains the following Discussion in relation to Rule 302(c) "Grounds for Apprehension:" "A person who determines probable cause may rely on the reports of others."

*Appendix B*

Furthermore, the court must agree with the Government that Commander Downs is entitled to something akin to quasi-judicial immunity in performing his function of considering McKee's affidavits, making a determination of probable cause and issuing Command Authorizations for Search and Seizure based thereon. Although Commander Downs is a member of the executive branch of the government, he is required to discharge "quasi-judicial" duties when issuing search authorizations in exercise of his powers and duties over the persons and property under his command. *United States v. Stuckey*, 10 M.J. 347 (C.M.A. 1981) (fourth amendment issue is not whether Commander issues true warrants, but whether his actions comport with the fourth amendment's requirement of reasonableness). *See also United States v. Ezell*, 6 M.J. 307, 315 (C.M.A. 1979) ("the Fourth Amendment applies with equal force within the military as it does in the civilian community. It is likewise clear that in the military, as in the civilian, communities, the official empowered by law to issue search warrants under the Fourth Amendment must be neutral and detached and must perform his duties with 'a "judicial" rather than a "police" attitude' ") (footnotes omitted)).

Even if quasi-judicial immunity were inapplicable to Downs, the court concludes that his issuance of the command Authorizations were based on probable cause as set forth in McKee's Affidavits. Plaintiffs have failed to suggest a cognizable theory of imputing alleged constitutional violations, if any, in the execution of those Authorizations, to Downs in his individual capacity.

For the foregoing reasons, therefore, the court concludes that plaintiffs have failed to state a claim upon which relief may

be granted under *Bivens* with regard to Commander Downs. Defendants' Motion to Dismiss or for Summary Judgment is ALLOWED as to Downs.

## SUMMARY

In summary, the plaintiffs have not stated a claim against either of the named defendants under which they are entitled to recover damages pursuant to *Bivens*. Therefore, the defendants' Motion to Dismiss or for Summary Judgment is ALLOWED and this action hereby is DISMISSED.

SO ORDERED,

This 4th day of May, 1995.

s/ James C. Fox
JAMES C. FOX
United States District Judge